

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 12 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	
Western Wireless Corporation)	
)	CC Docket No. 96-45
Petition for Designation as an)	DA 99-1847
Eligible Telecommunications Carrier)	
And For Related Waivers to Provide Universal)	
Service to the Crow Reservation in Montana)	

**COMMENTS OF PROJECT TELEPHONE COMPANY, INC.
AND RANGE TELEPHONE COOPERATIVE, INC**

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L St., N.W., Suite 520
Washington, D.C. 20037
(202) 296-8890

No. of Copies rec'd 076
List ABCDE

TABLE OF CONTENTS

SUMMARY	iv
I. INTRODUCTION AND BACKGROUND	2
A. The Western Wireless Petition	2
1. Eligible Telecommunications Carrier designation	2
2. Waivers	3
B. Project Telephone Company Service to the Crow Reservation	3
C. Range Telephone Cooperative Service to the Crow Reservation	9
II. WESTERN WIRELESS HAS NOT ESTABLISHED FCC JURISDICTION TO ACT UNDER SECTION 214(e)(6)	10
A. The 1997 Amendment Adopting Section 214(e)(6) Is the Sole Source of Commission Authority to Grant Etc Designation.	10
1. The 1997 amendment grants the commission authority to designate as “eligible telecommunications carriers” only those carriers not subject to the jurisdiction of a state commission	11
2. Commission implementation	12
B. Western Wireless Has Failed to Establish That Its Service Is Not Subject to State Commission Jurisdiction To Grant ETC Designation	13
1. The Montana PSC is authorized by the legislature to designate ETCs throughout the state.	13
2. Western Wireless has not shown that the Montana PSC lacks authority to designate ETCs on the Crow Reservation	15
3. Section 332 does not prohibit the Montana PSC from designating CMRS providers as ETCs	17
4. The Commission’s decisions granting ETC status to tribally owned LECs in Arizona do not support a claim that the Montana PSC does not have jurisdiction to grant ETC designation to a non-tribally owned carrier in Montana	20
C. Section 214(e)(6) does not extend the commission’s jurisdiction to areas where the state does have jurisdiction	22

D.	To the extent there are any legitimate jurisdictional issues, they should be resolved in the pending rulemaking proceeding	23
E.	Conclusion	24
III.	EVEN IF, <i>ARGUENDO</i>, THE COMMISSION HAS JURISDICTION, WESTERN WIRELESS HAS NOT SHOWN IT IS ELIGIBLE FOR ETC DESIGNATION	24
A.	WW Does Not Offer the Services Specified By Sec. 54.101(a)	24
1.	Voice grade access to the Public Switched Network	24
2.	Local Usage	25
3.	Lifeline/Toll Limitation	26
B.	Western Wireless Has Not Established That the Public Interest Would Be Served by Grant of Its Petition in the Area of the Rural Telephone Companies	27
IV.	WW HAS NOT JUSTIFIED ITS WAIVER REQUESTS	31
A.	Waivers Requested	32
B.	The Waivers Are Unjustified, But If Granted, Should Be Made Available to All ETCs	32
V.	CONCLUSION	34

SUMMARY

Western Wireless has asked for federal designation as an Eligible Telecommunications Carrier on the Crow Reservation, allegedly to bring improved service to a high poverty area. WW both grossly exaggerates the extent of the subscribership deficit on the Reservation, and implies that a grant of ETC status to it will lead to substantial improvement. This assertion is without foundation, WW claims incorrectly that only 45.1 percent of the households on the Reservation have access to telephone service, while, in fact, service is available to more than 99%. The incumbents have made substantial commitments to participation by the Tribe in management and operation of their companies. The basic reason why only 70% of the Reservation's households subscribe to service is the severe economic problems existing there, including extremely high unemployment. The incumbent Rural Telephone Companies, Project and Range, provide first class service at reasonable rates to the entire community; there is no reason to conclude that an additional ETC would have a material effect on the level of subscribership.

Any applicant to the Commission for ETC designation must demonstrate that the state commission does not have jurisdiction to grant such an application. WW has not established this essential prerequisite so its Petition must be dismissed without consideration of the merits. The relevant Montana statute and the position of the Montana Public Service Commission are both clear that the state has the requisite jurisdiction, and the Commission has been assured that WW's application will be fairly considered. WW's two theories of exemption from state jurisdiction are both inconsistent with its application to Montana and 12 other states for ETC

designation. WW's claim that the state has no jurisdiction because WW proposes to provide service on a reservation is not supported. A conclusion that states have no jurisdiction over non-tribally owned carriers on reservations would create regulatory chaos in all states with reservations. Acceptance of this claim would also necessarily prejudge the Commission's pending rulemaking on Tribal Subscribership, without benefit of the extensive information requested therein.

This application differs materially from the Commission's previous grants of ETC status to tribally owned carriers on their own reservation where the state did not assert jurisdiction. Nor does Section 332(c)(3)(A) of the Communications Act establish a right to federal preemption. That statute precludes state regulation of entry and rates of CMRS carriers, but ETC designation is not entry regulation and the Commission is still considering whether the fixed service proposed should be awarded a legal fiction that it is a mobile service.

Even if, *arguendo*, the Commission does have jurisdiction to consider this Petition, WW has not demonstrated that it is eligible for ETC designation. WW's claims that it is currently offering the supported services are demonstrably wrong; it does not provide voice grade service throughout the area, it does not offer an amount of local usage "free of charge," and it does not offer Lifeline or toll limitation services. Of course it promises it will do all these things once it is designated, but the statute and rules speak in the present tense, not the future. WW mistakenly relies on a Commission designation order which applied its rules permitting extension of time in which to offer certain of the proposed services. This ruling does not support WW's proposition that any or all of the proposed services may be offered after designation. Even if the Commission could accept promises for facts, WW has not presented any information from which

the Commission reasonably could conclude that WW's promises are likely to be fulfilled.

WW does not establish that the Public Interest would be served by designation of a second ETC in the service areas of the two Rural Telephone Companies. Other than a wider calling scope, WW does not propose any measurable benefits to subscribers. To the contrary, its cellular-based fixed service will be of lower quality, provide significantly slower Internet access, and will not offer equal access to long distance carriers. At the same time, any substantial loss of revenue by Project and Range will not be accompanied by corresponding reductions in expense or investment required, and can, therefore, be expected to affect adversely their ability to maintain their quality of service and evolve toward the provision of advanced services.

WW asks for a series of waivers, which, if granted would amount to its own individualized USF program, on the basis of the slimmest of justifications. To the extent any of these are granted, the incumbents should receive equal treatment.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Western Wireless Corporation)	
)	CC Docket. No. 96-45
Petition for Designation as an)	DA 99-1847
Eligible Telecommunications Carrier)	
And For Related Waivers to Provide Universal)	
Service to the Crow Reservation in Montana)	

**COMMENTS OF PROJECT TELEPHONE COMPANY, INC.
AND RANGE TELEPHONE COOPERATIVE, INC**

Project Telephone Company, Inc. (Project), and Range Telephone Cooperative, Inc. (Range), by their attorneys, file these Comments to the Petition of Western Wireless Corporation (WW) for designation as an Eligible Telecommunications Carrier on the Crow Reservation and the remainder of Project's study area in Montana, as well as for certain waivers.¹ Project and Range are Rural Telephone Companies as defined in the Communications Act and are two of the three incumbent local exchange carriers serving the Crow Reservation.

¹ Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana ("Petition"); Public Notice, DA 99-1847, Sep. 10, 1999.

I. INTRODUCTION AND BACKGROUND

A. The Western Wireless Petition

1. Eligible Telecommunications Carrier designation

Western Wireless (WW) requests designation as an Eligible Telecommunications Carrier (ETC) by this Commission pursuant to Section 214(e)(6) “for a service area comprising the Crow Reservation in the state of Montana”² and “some limited adjacent areas” by which it means the portion of Project’s study area which is not within the Reservation.³ WW claims that it is eligible for ETC designation because it “currently provides” the services designated in Section 54.101(a) of the Commission’s rules.⁴ WW states that it plans, upon ETC designation, to make a universal service offering of these elements throughout the Crow Reservation using wireless local loop customer premises equipment which will interface with its cellular network.⁵

² Petition at 1. WW acknowledges at n. 12 that it has a pending ETC petition before the Montana PSC “for areas that fall within the company’s cellular service area in Montana,” i.e., the entire state, including the Crow Reservation.

³ Petition at 14 and n. 26. But see, Petition at n. 12, “the instant Petition seeks designation of the company as an ETC *solely* on the Crow Reservation....”(emphasis added); DeJordy Affidavit, at 2, “so that the Company can serve the universal service needs of consumers residing *in and around* the Crow reservation.” DeJordy Affidavit at 7, “seeking designation in the wire centers that serve the Crow; alternatively, Western Wireless seeks designation as an ETC in the study area of the [sic] rural telephone company (Project Telephone Cooperative, Inc. [sic]) and in the wire center of the non-rural telephone company (US West Communications, Inc.) that serves the Crow reservation .” Appendix D to the Petition contains a list of wirecenters in the proposed service area which does not include any portion of Range’s service area on the Crow Reservation.

⁴ Petition at 4 and Exhibit D. Although asserting that it “currently offers” the supported services, WW elsewhere states that it is eligible for designation because it offers “*or will be able to offer* all of the services designated for support by the Commission” (emphasis in original, citation omitted). This distinction is discussed in Part III, *infra*.

⁵ Petition at 5.

2. Waivers

WW also asks for waivers of several of the rules for computation of universal service support on the basis of the special circumstance of the low penetration rates on the Reservation and the public interest in promoting competitive service. Specifically, it requests that it receive support calculated by the forward-looking cost model scheduled to be effective January 1, 2000, including both the federal and state shares.⁶ In addition it requests that its support be based upon a benchmark of \$10, rather than a nationwide average.⁷ WW also requests that the 18-month to two-year delay before receiving support in the present rules be waived so that it can begin receiving support immediately.⁸

B. Project Telephone Company Service to the Crow Reservation

As explained in detail in Part II of these comments, this Commission does not have jurisdiction to consider WW's application. To establish jurisdiction, WW must show that the Montana Public Service Commission does not have jurisdiction to grant ETC status to WW. It has not made this showing. In addition to failing to establish the jurisdictional prerequisites for this application, WW's Petition contains many assertions which could, if believed, lead the Commission to the false conclusion that the low level of subscribership on the Reservation is somehow a result of inadequate facilities or effort on the part of Project or Range as the incumbent local exchange carriers (ILECs). Accordingly, Project takes this opportunity to

⁶ Petition at 19. WW also asks for waiver of the universal service support rules to cover both the federal and state share. Petition at 21.

⁷ Petition at 20.

⁸ Petition at 20.

describe its operations on the Reservation and its efforts to improve not only subscribership, but also to improve economic and educational conditions on the Reservation generally.

The Crow Reservation comprises approximately 2.5 million acres in south-central Montana approaching Billings on its western border and Wyoming on the south.⁹ The Crow Nation has 10,001 enrolled members, approximately half of which live on the Reservation. While the average age is 28, 90% of those over the age of 45 speak Crow as a first language. No newspapers are published on the reservation. Unemployment estimated as high as 85% means that the population of the Reservation experiences severe economic difficulties.

The Reservation currently receives telecommunications service from three incumbent local exchange carriers ("ILECs"), Project, Range, and U S West. There are two cellular companies, Western Wireless and CommNet Cellular.¹⁰ Project serves 1,706 access lines on the Reservation in four exchanges, Crow Agency, Lodge Grass, Wyola and Fort Smith.¹¹

⁹ A map of the Reservation is attached to the Commission's copies of these Comments as Attachment A. Note that the land holdings comprise a patchwork of allotment land, fee land and tribally owned land. See, *Montana v. United States*, 450 U.S. 544 (1980).

¹⁰ There are significant "dead spots" in the cellular signal coverage of the Reservation as discussed in Section III, below.

¹¹ See Attachment A. Approximately 30% of Project's access lines are on the Crow Reservation. Project serves an additional 3800 access lines in four additional exchanges in Montana and two in Wyoming. U S West serves approximately 500 access lanes in the community of Pryor; Range serves approximately 38 lines on the eastern edge of the Reservation.

Project acquired four exchanges on the Crow Reservation with approximately 1300 access lines from US West in 1994.¹² Since the acquisition, Project has invested \$1,869,054 to improve and expand these exchanges in order to install digital switching and fiber optic facilities. These improvements allow the provision of equal access and custom calling services. Dial-up Internet access on a toll-free basis has been available since 1997. Project is in the first year of an \$800,000 network upgrade for the two most populous exchanges on the Reservation. On completion of this project, high speed Internet access and other DSL technology based services will be available. **Telephone service is immediately available to more than 99% of the households on the reservation, and more than 70% are presently subscribers.**¹³ These facts stand in direct contradiction to WW's claim that **"only 45.1 percent of the households on the reservation have access to basic telephone service."**¹⁴

Project is very much aware that the 70+0% penetration rate is substantially below the national average, and is doing all it can to increase subscribership. The problem has nothing to do with lack of availability of telephone service and everything to do with the economic situation

¹² *In the Matter of U S West Communications, Inc. and Nemont Telephone Cooperative, Inc., Project Telephone Company, and Valley Telecommunications, Inc. Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules and Petition for Waiver of Sections 61.41 (c) and 69.3(e) of the Commission's Rules*; Memorandum Opinion and Order, AAD 93-87, 9 FCC Rcd 721 (1994).

¹³ When Project acquired the exchanges, 13% of the households did not have access to wireline service and toll free Internet access was not available. Today that number is less than 1%, or 13 homes, each of which are more than a mile from existing facilities and none of which have requested service and toll free Internet access is available in all Project exchanges..

¹⁴ Petition at 2-3 (emphasis in original).

on the Reservation.¹⁵ In fact, almost all the residences without service have previously had service, but either voluntarily discontinued or were disconnected for non-payment. There is thus no basis to conclude that adding a second ETC on the Crow Reservation “will result in a significant increase in telephone subscribership” since there are virtually no areas within Project’s service area that are “unserved or underserved.”¹⁶

Project has utilized BETRS radio to reach some of the more remote subscribers where that technology was cost effective.

Project’s residential local service rate is \$13.84 per month. Project was designated an ETC by the Montana PSC on December 10, 1997.¹⁷ The full Lifeline reduction of \$10.50 is available to eligible customers. As the Commission is aware, Project has actively sought to increase the low participation in Lifeline which results, in part, from the Montana statutory requirement that participants be enrolled in Medicaid¹⁸. Because tribal members have access to federal health services through the Bureau of Indian Affairs, many who are otherwise eligible do

¹⁵ As unfortunate as the penetration rate is on the Reservation, the situation is materially better than on other Reservations which the Commission has visited and with other areas of comparable low per capita income. See, *In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 99-204, 64 Fed. Reg. 52738, Sep. 30, 1999. (“Tribal Subscribership RM”).

¹⁶ Petition at 3. For the very few households not passed by existing facilities, Project will generally construct facilities without an aid to construction obligation for the first mile of line extension. For longer loops, a sliding scale contract obligation is required.

¹⁷ Montana PSC Order No. 6005a, Docket No. D96.2.18 (1997) (“Montana PSC Order”).

¹⁸ Tribal Subscribership RM at 32-33, ns. 148, 151. (Re: Comments of Larry Wetsit, Nemont Telephone Cooperative (Project’s parent) in BO Docket No. 99-11). A copy of Mr. Wetsit’s comments are attached for the Commission’s convenience as Attachment B.

not enroll in Medicaid. If the Commission has not remedied this problem by changes to the Lifeline rules by the next session of the Montana legislature in 2001, Project will actively seek a change in the state requirement.

Service is available without deposit for customers who do not qualify for credit if they agree to toll restriction, pay connection and local service charges in advance and make minimum monthly payments on outstanding charges. This policy has been advertised by direct mailing to all residents.

Project has also actively pursued regulatory authority to offer expanded local calling area service which would allow subscribers on the Reservation to call toll-free to Billings, the major trading area in the region. The procedures are, however, quite time consuming. The Montana PSC issued an order on September 29, 1999 giving Project 90 days to submit a cost analysis and proposed EAS rate designs. If there are no objections filed with the PSC, EAS may be established within six months; objections could delay the process by a year or more. Project's efforts have been detailed in its subscriber newsletter over the past two years, copies of which are attached.¹⁹ Six public meetings were held to explain the process to subscribers, two of which were on the Reservation.

Project has consciously worked to involve members of the Crow Nation in the management and operation of the telephone company. In addition to appointing a member of the Crow Tribe to its Board of Directors, Project has sought from the inception of its service to maximize the proportion of its staff jobs filled by tribal members, with preference to those who

¹⁹ See Attachment C.

speak the Crow language. It has provided technological training and well-paid steady employment to these individuals, which directly improves economic conditions.

Prior to purchase of the exchanges on the Crow Reservation, Project's management met with tribal officials to discuss their needs, described the service provided by Project's parent, Nemont Telephone Cooperative, Inc. on the Fort Peck Reservation, and explained the company's intent to abide by all Ordinances and rules of the Crow Tribe, to hire and train members of the tribe, promote economic development and utilize technology to provide educational opportunities on the Reservation. Project believes it has fulfilled these commitments. All Project employees and directors attended cultural awareness sessions at Little Big Horn College to ensure understanding of the history of the Crow Tribe, its governmental structure, culture and language.

Project has worked closely with all the educational institutions and libraries on the Reservation to ensure that those eligible obtain "e-rate" discounts and that funding is available for computers, interactive television and other distance learning services. Project's parent has assigned a consultant to providing assistance to schools in the area of both companies with e-rate funding. Specifically, he helped the schools to complete their USAC forms which resulted in them obtaining full funding at the 90% discount level. These efforts have been greatly appreciated by the schools and libraries.²⁰

Project participates in career activities with the schools; presents sessions on telephone etiquette and technology; and participates in the School- to-Work program with Little Big Horn

²⁰ This consultant also assisted schools in the U S West service area on the Reservation.

College, including sitting on its advisory board. Project sponsored the writing of grants by Big Horn Fiber Optic Consortium Uniting Schools ("Big Horn FOCUS"), a consortium of Reservation schools, which obtained a large grant for interactive television. The mission of Big Horn FOCUS is the preservation of the language and culture of the Crow Tribe. Project contributes to the annual Crow Fair and provides all necessary telecommunications facilities for this five day function focused on the customs of the Tribe. Project also contributes to a large number of other community activities.

Interactive television for educational purposes is available at many of the schools on the Reservation, with more being installed. This system allows students to attend classes without having to travel great distances and includes adult education as well as traditional classes. Hospitals on the Reservation are presently planning to use the ITV technology.

Project is a member of Vision Net, a partnership of small companies that has established a 70-site interactive educational video system in rural communities across Montana. Vision Net, served by an ATM network, is one of the leading rural networks in the country. Construction on a new hub site in Billings began in May of this year, prior to the WW Petition. The site has been prepared, all peripheral equipment (batteries, generator, power panels, air conditioning, cable racking, etc.) is currently being installed, and the ATM equipment is expected to be installed at the end of this month. On completion of this hub, six Vision Net sites will be constructed on the reservation over the next twelve months.

C. Range Telephone Cooperative Service to the Crow Reservation

Range Telephone Cooperative provides service to approximately 565 square miles of the Crow reservation. Range's service area is a very remote area of the reservation

located along its extreme eastern edge. The Cooperative has installed over 55 route miles of buried facilities in order to provide modern telecommunication services to 37 Cooperative members in this portion of the reservation. The local service rate is \$10.65 per month. Internet access is available toll free.

The Range Telephone Service area also includes the entire Northern Cheyenne Reservation which adjoins the Crow Reservation on the East. Two members of the Northern Cheyenne Tribe are members of the Board of Directors of the Cooperative.

It is the Cooperative's goal to provide modern telecommunication services to all households located within its service area and does so through the use of a very liberal aid-to-construction policy. The Cooperative will invest up to a maximum of \$3,000 per line in labor and material to bring service to new or unserved households. Furthermore, any aid-to-construction collected from the subscriber is returned at the rate of 20% per year provided the subscriber maintains service at the original location.

Services provided by the Cooperative on the Crow reservation include Internet access, custom calling features, Voice Mail and digital data services in addition to basic exchange service.

II. WESTERN WIRELESS HAS NOT ESTABLISHED FCC JURISDICTION TO ACT UNDER SECTION 214(E)(6)

- A. The 1997 Amendment Adopting Section 214(e)(6) Is the Sole Source of Commission Authority to Grant ETC Designation.

Before it contemplates whether to take any action regarding the merits of the Western Wireless Petition, the Commission must first determine that it has jurisdiction over the

subject matter of the request. In the absence of a statutory grant of jurisdiction, the Commission has no power to act.²¹

1. The 1997 Amendment Grants the Commission authority to designate as “Eligible Telecommunications Carriers” only those carriers not subject to the jurisdiction of a State commission.

On October 30, 1997, Senator McCain introduced S.1354 to enable the Commission to designate common carriers not under the jurisdiction of a State commission as “eligible recipients of universal service support.”²² Senator McCain pointed out that, as adopted in 1996, Section 254(e) of the Act restricts universal service support to carriers that have been designated “eligible” under Section 214(e), by a State commission. This provision did “not account for the fact that State commissions in a few States have no jurisdiction over certain carriers. “Typically,” he continued, “States also have no jurisdiction over tribally owned common carriers....”²³

In the floor discussions in the Senate, and subsequently in the House, the question was raised as to the effect of the bill on state jurisdiction.

MR. DASCHLE. Would this bill have any effect on the existing jurisdiction of State commissions over new or incumbent local exchange carriers or providers of commercial mobile radio services?

MR. McCAIN: No, this bill does nothing to alter the existing jurisdiction that State commissions already have over local exchange carriers or providers of

²¹ Neither Sections 4(i) or 201(b) provide any jurisdiction because the Act explicitly assigns the power to designate ETCs to the state commissions. Only where the state has no authority over the carrier is the Commission empowered to grant ETC status.

²² 141 Cong. Rec. S12568, Nov. 13, 1997.

²³ Id.

commercial mobile radio services as set forth in section 332(c)(3) of the Communications Act....²⁴

MR. THUNE: ...Am I correct in understanding that nothing in this bill is intended to expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation?

MR. BLILELY: Madam Speaker, the gentleman is correct,...²⁵

The bill was signed by President Clinton on December 1, 1997.²⁶ The Act, as amended, thus now provides that “eligible carrier designation” is to be accomplished by state commissions, unless the carrier providing telephone exchange service and exchange access is not subject to the jurisdiction of the state commission. The 1997 amendment, however, made no change in the existing authority of the states.

2. Commission Implementation

On December 18, 1997 four tribally owned local exchange carriers operating on reservations in Arizona petitioned the Commission for designation under the new provision.²⁷ These petitions were granted on February, 27, 1998.²⁸ Prior to granting the petition, the

²⁴ Id.

²⁵ 141 Cong. Rec. H.10808-09, Nov. 13, 1997.

²⁶ Public Law 105-125

²⁷ Petition of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc. and Tohono O’odham Utility Authority, Dec. 18, 1997. (“Fort Mojave Petition”).

²⁸ Memorandum Opinion and Order, AAD/USB File No. 98-28, 13 FCC Rcd 4547 (1998) (“Fort Mojave Order”).

Commission issued a Public Notice establishing procedures to implement Section 214(e)(6). To establish the Commission's jurisdiction, petitioners are required to provide:

A certification and brief statement of supporting facts demonstrating that the petitioner is "not subject to the jurisdiction of a state commission".....²⁹

The Fort Mojave Petition established FCC jurisdiction by citing the legislative history of the Amendment indicating that one of its specific purposes was to ensure that carriers owned by Native Americans continue to receive universal service support. The Petition also noted the Commission's prior recognition of tribal sovereignty, the certification and regulation of the carriers by the respective tribal councils, and the fact that the Arizona Corporation Commission does not assert jurisdiction over the tribal companies.³⁰ Based on these showings, unchallenged by any party, including the Arizona Commission, the FCC concluded that "we may, pursuant to our delegated authority, designate them as eligible telecommunications carriers."³¹

B. Western Wireless Has Failed To Establish That Its Service Is Not Subject To State Commission Jurisdiction To Grant ETC Designation

1. The Montana PSC is authorized by the legislature to designate ETCs throughout the state.

Western Wireless does not provide any credible support for its claim that the Montana PSC lacks jurisdiction to grant ETC status to carriers serving the Crow Reservation. Montana law expressly gives the PSC authority to designate all telecommunications carriers as ETCs, without any exception for wireless carriers, non-ILECs, carriers serving Indian

²⁹ FCC 97-419, Dec. 29, 1997. The new OMB expiration date is May 31, 2001.

³⁰ Fort Mojave Petition at 2-6.

³¹ 13 FCC Rcd at 4550 (internal cites omitted).

Reservations, or carriers not otherwise subject to the PSC's jurisdiction.³² This statute shows on its face that it was enacted specifically to deal the issue of ETC designation of otherwise unregulated carriers. The Montana PSC has, pursuant to this authority designated as ETCs the carriers serving all seven reservations in the state.³³

WW's ETC petitions to Montana and 12 other states, each of which includes Indian reservations, are entirely inconsistent with its claim that the Montana has no jurisdiction over it.³⁴ WW cannot simultaneously tell this Commission that the Montana PSC has no jurisdiction over its service on a reservation, and celebrate its grant of ETC status by the Minnesota PSC for a service area that includes reservations.³⁵ Long accepted practice and procedures are

³² See, Section 69-3-80, Mont. Code Ann.. "Determination of eligible carrier status--universal service support. (1) The commission is authorized to designate telecommunications carriers as eligible for federal universal service support, in accordance with 47 U.S.C. 214(e)(1) and 47 U.S.C. 254, and for any Montana universal service funds. This authorization applies to all telecommunications carriers *notwithstanding the carrier's exemption from further regulation by the commission.*" (emphasis added).

³³ Montana PSC Order.

³⁴ In its ETC Petition to the Montana PSC, WW asserted that the state commission's power to designate it derived from Sections 214(e) and 254 of the Communications Act. Western Wireless Corporation Amended Petition for Designation as an Eligible Telecommunications Carrier, Montana PSC Docket No. D98.8.190, Aug. 1988, p. 2.. In its ETC proceeding before the Public Service Commission of Wyoming, WW argued against claims of interveners that the PSC did not have jurisdiction to grant ETC status, asserting that both Wyoming law and Section 214(e)(2) of the Communications Act confer jurisdiction. *In the Matter of the Amended Application of WWC Holding Co., Inc., (Western Wireless) for Authority to be Designated as an Eligible Telecommunications Carrier*, Docket No. 70042-TA-98-1 (Record No. 4432), Order Granting Motion to Dismiss Amended Application, Aug. 13, 1999.

³⁵ Western Wireless Becomes First Carrier in Nation to be Designated as an Eligible Telecommunications Carrier for Universal Service Funding in Rural Areas, WW News Release, Sep. 30, 1999. WW has not stated that Montana jurisdiction is in any way unique from other states.

consistent with state commission exercise of jurisdiction over *non- tribally owned* telecommunications carriers as to service provided on reservations, as well as off.

Only a small portion of the population of the reservations nationwide are served by tribally owned companies. The great majority are served by carriers subject to regulation by the state. If Montana has no jurisdiction over Western Wireless on the Crow Reservation, then it must also be without jurisdiction over all other carriers in the state where they serve on a reservation, including Project. A finding that states have no jurisdiction over non- tribally owned carriers would create instant regulatory chaos in every state with a reservation, and would invalidate, in part, all of the ETC designations of carriers serving those reservations.³⁶

2. Western Wireless has not shown that the Montana PSC lacks authority to designate ETCs on the Crow Reservation.

Western Wireless asserts that the state has no jurisdiction because the service “falls within the areas of tribal, rather than state, authority.”³⁷ The only support for this proposition is a quotation of *dicta* from a Supreme Court decision regarding the authority of the Crow Tribe to regulate fishing and hunting within its reservations by non- members of the tribe. The opinion of the Court is focused on its determinations that title to the bed of the Big Horn River passed to the state of Montana upon its admission to the Union, and that the tribe has no power to regulate non-Indian fishing and hunting on reservation lands owned in fee by non-

³⁶ If the ETC designations are invalid, any universal service support provided for access lines on reservations would have to be discontinued and amounts paid refunded to January 1, 1998. If Project’s ETC designation is invalid, its USF revenue will decline by approximately \$17 per access line per month on the Crow Reservation.

³⁷ Petition at 8..

members of the tribe.³⁸ In passing the Court noted that tribes retain power to exercise *some forms* of civil jurisdiction over non-Indians on fee lands.³⁹ Whether or not the Supreme Court would ever apply this general statement to the specific situation here is pure speculation, upon which the Commission cannot base jurisdiction in this case.

The Court notes that over 30 percent of the territory of the Crow Reservation is held by non-Indians (including the State and federal government)⁴⁰ Western Wireless claims that its “offering to Native American residents and business on the Crow Reservation is not subject to state jurisdiction”, however, many of the customers within its proposed service area are not Native Americans and do not reside on trust land. If the Commission were to consider the claim that the state has no jurisdiction, it must consider whether the tribe’s jurisdiction extends to service to residences of non-members of the tribe living on fee simple land as well as tribal members living on trust land.

Western Wireless has provided no guidance for the Commission to navigate this difficult and uncharted area. In the *Tribal Subscribership RM*, the Commission recognizes that the issue of the appropriateness of state regulation of the activities of non-tribal members within a reservation requires a “ ‘particularized inquiry ‘ into the nature of the state, federal and tribal interests at stake”, including whether the “regulation is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the

³⁸ *Montana v. United States*, 450 U.S. 544 (1980)

³⁹ *Id.* at 450 U.S. 565.

⁴⁰ *Montana v. United States*, 450 U.S. at 548.

assertion of state authority.”⁴¹ WW has provided the Commission with no information or analysis of these important aspects of jurisdictional determination. It should be noted, however, that because WW is seeking second ETC status in the service areas of two Rural Telephone Companies which serve both on and off the Crow Reservation, the state has a significant interest in “the preservation of the ability of existing ETC-designated carriers to continue service in rural areas....”⁴²

3. Section 332 does not prohibit the Montana PSC from designating CMRS providers as ETCs.

Western Wireless states that it “is a Commercial Mobile Radio Service (‘CMRS’) provider that is statutorily exempt from rate and entry regulation by state commissions.”, but does not explain whether it believes that Section 332(c)(3)(A) somehow supports its claim of FCC jurisdiction under Section 214(e).⁴³ WW ignores the fact that Section 332(c)(3)(A) addresses jurisdiction over *services*. It prohibits states from rate and entry regulation of “commercial mobile service,” but does not exempt carriers which provide such service from the jurisdiction of state commissions for other purposes.⁴⁴ This section, in fact, specifically acknowledges that states may regulate “other terms and conditions of commercial mobile

⁴¹ *Tribal Subscribership RM* at para. 80.

⁴² Montana PSC Comments at 2.

⁴³ Petition at 7-8. In its petition to this Commission for ETC status in Wyoming, WW asserts that “State implementation of Section 214(e) is arguably a form of entry regulation (particularly given the overall focus of Section 214 of the Act on authorizing carriers to extend facilities to provide service.)” Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, September 29, 1999, at 4 and n.7 (“FCC Wyoming ETC Petition”)

⁴⁴ 47 U.S.C. 332(c)(3)(A).

service.”⁴⁵ Thus some aspects of WW’s Commercial Mobile Radio *Services* may be statutorily exempt from state regulation, but WW the carrier is not, and other aspects of its services are not, and this Commission has yet to resolve whether fixed wireless service should be considered “mobile.”⁴⁶

The Commission has tentatively concluded that, although ambiguous, the better interpretation of Section 214(e)(6) is that its concern is with jurisdiction over services and geography, rather than carriers.⁴⁷ Assuming, *arguendo*, that interpretation is correct, WW must still show that it is “providing telephone exchange service and exchange access” and that its fixed wireless service is not subject to the authority of the Montana PSC to determine ETC status. It has done neither, nor can it.

A conclusion that CMRS providers may only be designated as ETCs by the FCC, would, if correct, apply to the entire country, not just reservations. Perhaps this is WW’s ultimate goal, but it is inconsistent with the statute and the Commission’s prior decisions. In addition, because

⁴⁵ Id.

⁴⁶ *Amendment of the Commission’s Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Service*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 8965, 8987 (1996); “Some parties have also argued that because these fixed wireless services would be provided by CMRS providers in spectrum that has been allocated for CMRS, the service providers must therefore be regulated as CMRS. We disagree. The regulatory structure for providers of the primary service to which the spectrum is allocated does not necessarily dictate the type of regulation to which every service provider in the same band will be subject regardless of the particular attributes of the service.” (internal citations omitted).

⁴⁷ *Tribal Subscribership RM* at para. 72. 47 U.S.C. 214(e)(6) grants jurisdiction to the FCC “In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission...”

designation of a second ETC in the area of a rural telephone company requires a separate public interest finding, which state commissions are best able to make, it would be unwise for the FCC to make this decision for some carriers, and states for others.

A claim by Western Wireless that state commissions cannot grant ETC designation to providers of CMRS services would be inconsistent with its filing of ETC applications in thirteen states, including Montana. If it has changed its mind and now really believes it or its services for which it wants USF are exempt from state ETC authority it would withdraw them all and put all 13 state designation requests before this Commission. But perhaps it is merely a firm believer in the maxim that “consistency is the hobgoblin of small minds.”

In any event, ETC designation is neither entry nor rate regulation and so is within the provision of Section 332 which permits states to regulate “other terms and conditions”.⁴⁸ WW’s argument in its federal petition for ETC status in Wyoming that ETC designation by a state is entry regulation prohibited by Section 332⁴⁹ is not supported by the plain meaning, the legislative history, basic principles of statutory construction, or the relevant FCC decisions. ETC designation says nothing about entry, it is entirely a question of whether universal service support is available. If Congress had intended for the FCC to have sole authority to designate CMRS providers, it would have made that explicit in the Act. The 1997 Amendment to Section 214(e) was adopted several months after the Commission had decided explicitly that CMRS providers were eligible for ETC designation and that states were empowered to grant such

⁴⁸ 47 U.S.C. 332(c)(3)(A).

⁴⁹ FCC Wyoming ETC Petition.

designations.⁵⁰

The Commission has not yet determined the regulatory status of fixed services offered by CMRS carriers; however, if Western Wireless is successful, in obtaining the business of “a substantial portion of the communications within the state” for its fixed service, it will become subject to state requirements designed to “ensure the universal availability of telecommunications service at affordable rates.”⁵¹

4. The Commission’s decisions granting ETC status to tribally owned LECs in Arizona do not support a claim that the Montana PSC does not have jurisdiction to grant ETC designation to a non-tribally owned carrier in Montana.

Western Wireless asserts that it is the Commission’s policy to accept an ETC’s representation that it is not subject to the jurisdiction of a state commission in the absence of evidence to the contrary, citing the order granting ETC status to Saddleback Communications.⁵² The Commission’s statement in that case must be considered in context. The applicant was a tribally owned company, operating in Arizona and which filed a letter from the Arizona Corporation Commission stating that it had “no jurisdiction over the services provided by Saddleback on the reservation.”⁵³ Given these circumstances and the Commission’s previous determination in *Ft. Mojave* that the Arizona Commission had no jurisdiction over tribally

⁵⁰ Universal Service Order, 12 FCC Rcd 8776, 8859 (1997); See Section II A 1, above.

⁵¹ 47 U.S.C. 332(c)(3)(A)

⁵² Petition at 8.

⁵³ Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214 (e)(6) of the Communications Act, 13 FCC Rcd 22433 (1998).

owned carriers, the Commission's statement can hardly be taken as a policy to accept all uncontested allegations of non-jurisdiction.⁵⁴ Western Wireless is not a tribally-owned company;⁵⁵ the service area proposed for ETC status is in Montana, not Arizona; and there is no letter from the Montana PSC disavowing jurisdiction..

There is, however, evidence to the contrary. Western Wireless' claim of non-jurisdiction is inconsistent with the Montana PSC's previous designation of the incumbent carriers serving the Crow Reservation as ETCs.⁵⁶ The statute specifically granting the PSC power to issue ETC designations was adopted to implement Section 214(e) and contains no exclusion of the Commission's authority in regard to Indian reservations.⁵⁷

Finally, unlike the Arizona Commission, the Montana PSC has affirmatively asserted its jurisdiction in early filed comments in this proceeding and assured this Commission that it will thoroughly and fairly consider WW's application pending before it.⁵⁸

⁵⁴ Nor could the Commission lawfully adopt a policy of assuming jurisdiction based solely on an applicant's claim. The Commission has recognized that it must affirmatively determine its jurisdiction in order to act. *Fort Mojave Order*, 13 FCC Rcd at 4550.

⁵⁵ The Commission notes in the *Tribal Subscribership RM* at para. 79 that "state law is generally inapplicable when states attempt to regulate the conduct of tribal members directly within reservation boundaries." There is no assertion that WW is a tribal entity.

⁵⁶ Montana PSC Order.

⁵⁷ See n. 32, *supra*.

⁵⁸ Montana PSC Comments, CC Docket No. 96-45, DA 99-187, October 6, 1999.

C. Section 214(e)(6) Does Not Extend the Commission's Jurisdiction to Areas Where the State Does Have Jurisdiction.

The Western Wireless Petition requests ETC designation “for a service area comprising the Crow Reservation in the state of Montana”⁵⁹ It attempts to distinguish somehow its pending application with the Montana PSC, which also proposes as service area encompassing the Crow Reservation, with the statement that this Petition seeks designation “solely on the Crow Reservation.”⁶⁰ Subsequent to making these categorical statements, Western Wireless apparently realized the implications of the conjunction of the requirement in Section 214(e)(1) to provide service throughout the service area designated and the requirement of Section 214(e)(5) that where an area is served by a rural telephone company the service area means that company's study area. It therefore asks that the designation be extended outside the boundaries of the Crow Reservation to encompass the remainder of Project Telephone Company's study area.⁶¹

Assuming, *arguendo*, that the Commission concludes it has jurisdiction to designate an ETC on the Crow Reservation, that conclusion would provide no basis whatsoever to extend that jurisdiction beyond the reservation. Alternatively, Western Wireless suggests the Commission could “waive” the requirement to serve an entire study area pursuant to its Section 10 forbearance authority, but it fails to even assert, let alone establish any of the elements

⁵⁹ Petition at 1.

⁶⁰ Petition at 7, n.12.

⁶¹ Petition at 14, n. 26. In Exhibit D, Western Wireless lists wirecenters it believes are within Project's study area. This list includes U S West's Billings-W, which is not in Project's study area.

necessary for the exercise of that authority.

- D. To the Extent There Are Any Legitimate Jurisdictional Issues, They Should Be Resolved in the Pending Rulemaking Proceeding.

In the *Tribal Subscribership RM* the Commission has sought comment on the very issue of the relationship between state jurisdiction and the Commission's authority under Sections 214 and 254, recognizing that it has a "long and complex legal history."⁶² The Commission has requested comment on the parameters of federal, state and tribal jurisdiction over service providers and asked both state and tribal authorities to comment on their regulatory activities on tribal lands. Given this recognition that it does not have precise knowledge of state exercise of jurisdiction on reservations, the complexity of the legal issues, and the significance for universal service on all reservations, it would be imprudent for the Commission to prejudge its rulemaking by a determination that the Montana PSC has no jurisdiction over WW. The contrary, however, is not true, since the burden is on WW to establish the lack of state jurisdiction, a finding that it has not met its burden does not prejudge the rulemaking.

The Commission suggests in the *Tribal Subscribership RM* at para. 80 that somehow it may have authority under Section 214 to preempt state authority on reservations. To the extent the Commission may consider this theory in this proceeding, the legislative history cited above makes abundantly clear that Section 214(e)(6) was agreed to only on the condition of an understanding that it "does nothing to alter the existing jurisdiction that State commissions already have over local exchange carriers or providers of commercial mobile radio services..."⁶³

⁶² *Tribal Subscribership RM* at paras. 39-45.

⁶³ 141 Cong. Rec. S12568, Nov. 13, 1997.

E. Conclusion

The Western Wireless Petition must be dismissed by the Commission for lack of jurisdiction. Western Wireless has not shown that the Montana PSC is without jurisdiction to determine ETC status of non-tribally owned telecommunications carriers on the Crow Reservation. Historical practice and precedent, as well as Western Wireless' own petition to Montana and the other states, the state and federal statutes, and the assertion of jurisdiction by the Montana PSC are to the contrary.

III. EVEN IF, *ARGUENDO*, THE COMMISSION HAS JURISDICTION, WESTERN WIRELESS HAS NOT SHOWN IT IS ELIGIBLE FOR ETC DESIGNATION

A. WW does not offer the services specified by Sec. 54.101(a)

WW claims, inconsistently, that it "currently offers each of the supported services" and upon designation as an ETC it *will* make a universal service offering that includes all of the services to consumers on the Crow Reservation.⁶⁴ Close reading of the item by item discussion reveals that its current cellular service does not meet all the criteria of Sec. 54.101(a).

1. Voice Grade Access to the Public Switched Network

Contrary to its claim, WW does not currently provide service to the entire Crow Reservation because there are substantial gaps in the coverage of its signal.⁶⁵ It is probably true that these gaps can, over time, be closed by construction of additional facilities, but WW's claim

⁶⁴ Petition at 9; DeJordy affidavit at 2.

⁶⁵ Attachment D is a map of the service area showing where coverage is not available according to a survey conducted by Project.